IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WARREN GENE JACKSON, Appellant.	No. 33590-5-II UNPUBLISHED OPINION

VAN DEREN, ACJ. – Warren G. Jackson appeals his sentence on remand for resentencing, arguing that the court failed to exercise its discretion when it refused to consider whether two prior offenses were the same criminal conduct. In a pro se Statement of Additional Grounds for Review (SAG),[1] he also challenges his conviction, asserting that the original trial court erred when it refused to instruct the jury on a lesser included offense of second degree assault. We affirm.

Facts

In September 2000, a jury convicted Jackson of first degree assault with a deadly weapon -- domestic violence. At sentencing, Jackson stipulated to his prior record and to an offender score that (1) included juvenile offenses he committed before turning 15 and (2) counted two 1994

[1] RAP 10.10.

Thurston County adult convictions[2] as separate offenses. Adopting the stipulated offender score, the trial court sentenced Jackson with an offender score of 10.

Jackson appealed his conviction; we affirmed. *State v. Jackson*, 113 Wn. App. 762, 54 P.3d 739 (2002) (published in part, No. 26503-6-II, Clerk's Papers (CP) at 40-52). He did not raise any sentencing issue in his direct appeal.

In June 2004, Jackson filed a personal restraint petition with this court, arguing, for the first time, that his offender score was incorrect because (1) his two 1994 Thurston County convictions should have been but were not considered the same criminal conduct and (2) his criminal history included juvenile offenses he had committed before reaching the age of 15 that should have washed out of his offender score under *State v. Smith*, 144 Wn.2d 665, 30 P.3d 1245, 39 P.3d 294 (2001).[3] *See* Order Granting Petition (No. 32154-8-II, filed Jan. 3, 2005, CP 62-65). We rejected Jackson's same criminal conduct argument, holding that he had waived this argument by stipulating to an offender score that counted the 1994 Thurston County offenses as separate offenses. But we remanded the case for resentencing after finding that Jackson's pre-age 15 adjudications should not have been included in his offender score.

On remand, Jackson argued that in addition to reducing his offender score to account for the excluded juvenile adjudications, the sentencing court was also required to reexamine whether

[2] These convictions were for first degree theft and second degree escape; both offenses were committed on April 18, 1994, and he was sentenced on October 28, 1994. The two offenses occurred while Jackson was being detained at Maple Lane School. He committed the theft by stealing facility keys from the person of a staff member at Maple Lane; he then used the keys to facilitate his escape from the facility.

[3] In *Smith*, our Supreme Court held that 1997 amendments to the Sentencing Reform Act of 1981, chapter 9.94A RCW, could not be applied retroactively and, thus, a defendant's juvenile convictions were improperly revived. 144 Wn.2d at 674-75.

his two 1994 Thurston County offenses were the same criminal conduct. In addition, he asserted that he was not bound by his prior stipulation because this was "a completely new sentencing hearing." Report of Proceedings (RP) at 13. Although the State appeared to agree that Jackson was not bound by his earlier stipulation,[4] it argued that the current sentencing court was bound by the Thurston County Court's determination that the two 1994 offenses were not the same criminal conduct.

Although it noted that the two 1994 Thurston County offenses might be the same criminal conduct, the sentencing court declined to consider the issue because it believed it was bound by the same criminal conduct determination made at the time Jackson was sentenced on the 1994 offenses. Accordingly, the sentencing court excluded the pre-age 15 juvenile offenses from Jackson's offender score, but continued to count the two 1994 Thurston County offenses as separate offenses. Jackson appeals.

DISCUSSION

I. Same Criminal Conduct

Jackson argues that on remand the sentencing court erred when it held that it was bound by the Thurston County Court's 1994 same criminal conduct determination and refused to exercise its discretion. He asserts that because the sentencing court failed to exercise its discretion, this case must be remanded.

As the State concedes, Respondent's Brief at 3, Jackson is correct that the sentencing court was not bound by the original 1994 same criminal conduct determination. *State v. McCraw*,

[4] The prosecutor stated that the stipulation was "null and void" because it contained the pre-age 15 juvenile offenses. RP at 14.

127 Wn.2d 281, 285-88, 898 P.2d 838 (1995) (citing *State v. Wright*, 76 Wn. App. 811, 888 P.2d 1214 (1995); *State v. Lara*, 66 Wn. App. 927, 834 P.2d 70 (1992)). But the sentencing court's refusal to consider the same criminal conduct issue was correct on other grounds.

The law of the case doctrine generally refers to "'the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand.'" *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (quoting *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992)) (internal quotations omitted). When we addressed Jackson's personal restraint petition, we fully considered and rejected his same criminal conduct argument. He did not seek review of our decision, and the certificate of finality issued in March 2005, terminating review. RAP 16.15(e). Thus, our decision became the law of the case and was binding on the sentencing court. *See State v. Strauss*, 119 Wn.2d 401, 412, 832 P.2d 78 (1992).

Although the trial court on remand had the discretion to address issues *not* previously addressed by this court,[5] we explicitly addressed and rejected Jackson's same criminal conduct claim when we examined his personal restraint petition. Accordingly, he fails to show that the trial court was required to address the same criminal conduct issue on remand.

We note, however, that the law of the case doctrine is discretionary, and this court can choose to review a previously decided issue if our earlier decision was clearly erroneous and the application of the law of the case doctrine would work a manifest injustice. *State v. Clark*, 143 Wn.2d 731, 744-45, 24 P.3d 1006 (2001) (quoting *Folsom v. County of Spokane*, 111 Wn.2d

[5] *See Strauss*, 119 Wn.2d at 413 (quoting *State v. Sauve*, 33 Wn. App. 181, 183 n.2, 652 P.2d 967, *aff'd*, 100 Wn.2d 84, 666 P.2d 894 (1983); citing RAP 2.5(c)(1)); *see also State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993).

256, 264, 759 P.2d 1196 (1988)); *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). In

previously rejecting Jackson's same criminal conduct argument, we held that he waived this challenge under *In re Personal Restraint of Connick*, 144 Wn.2d 442, 28 P.3d 729 (2001), *overruled in part on other grounds by In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002); *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999); and *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000 (2000). Jackson now appears to argue that our earlier decision was clearly erroneous because it relied on a misapplication of *Nitsch*.

Specifically, Jackson contends that *Nitsch* does not apply because that case involved a stipulation establishing that the defendant's *current* offenses were not the same criminal conduct, while here, the stipulation involves his *prior* offenses. He asserts that (1) although sentencing courts have discretion to determine whether current offenses are the same criminal conduct, RCW 9.94A.589(1)(a),[6] they are required to consider whether prior offenses are the same criminal conduct under RCW 9.94A.525(5)(a)(i);[7] and (2) the nondiscretionary nature of RCW 9.94A.525(5)(a)(i) somehow precludes the sentencing court from relying on a stipulation. But this is a distinction without a difference. Regardless of whether the sentencing court's same criminal conduct determination is mandatory or discretionary, same criminal conduct determinations are factually, as well as legally, based,[8] and Jackson cites no authority stating that the court cannot rely on factually based stipulations offered by the parties in making that determination. Accordingly, this argument also fails.

---

[6] Formerly RCW 9.94A.400. Laws of 2001, ch. 10 § 6.

[7] Formerly RCW 9.94A.360. Laws of 2001, ch. 10 § 6.

[8] We recognize that a defendant cannot stipulate to an offender score that is incorrect due to an error of law, such as one including previously washed out juvenile offenses. *Goodwin*, 146 Wn.2d at 873-74. But same criminal conduct determinations are not purely legal determinations. *Goodwin*, 146 Wn.2d at 874-75 (discussing *Nitsch*).

Because Jackson fails to show that the court on remand was required to consider whether his 1994 Thurston County offenses were the same criminal conduct or that our previous decision was clearly erroneous, he is not entitled to relief on this basis.

II. Statement of Additional Grounds

In his pro se SAG, Jackson argues that the trial court erred by refusing to instruct the jury on the lesser included offense of second degree assault. Issues that "'might have been determined had they been presented [in a prior appeal], will not . . . be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.'" *Clark*, 143 Wn.2d at 745 (quoting *Folsom*, 111 Wn.2d at 263). Jackson's lesser included offense argument relates to issues addressed solely at his original trial. Accordingly, we decline to address his alleged instructional issue.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

_____
Van Deren, A.C.J.

We concur:

_____
Bridgewater, J.

_____
Hunt, J.